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In the Supreme Court of the United States

OCTOBER TERM, 1983

LINDA SIDOTI PALMORE, PETITIONER

v.

ANTHONY J. SIDOTI

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits a state court from considering or relying upon the subsequent interracial marriage of a custodial parent as a ground for ordering a change in custody.

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INTEREST OF THE UNITED STATES

State-imposed racial classifications, such as that involved in this case, strike at the very heart of the Fourteenth Amendment's guarantee of equality before the law. As a general matter, the federal government has no interest in child custody proceedings. But the federal government does have a special interest in ensuring that the states exercise their regulatory powers without infringing upon fundamental rights guaranteed to every individual by the Constitution. Thus, the United States has participated as amicus curiae in cases such as *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Moreover,

Section 5 of the Fourteenth Amendment empowers Congress to enact appropriate legislation to enforce the Fourteenth Amendment against the states. Pursuant to Section 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, the United States may intervene in any federal suit "seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race [or] color." The United States therefore has a substantial interest in the Court's resolution of the equal protection issue raised in this case.[1]

STATEMENT

Petitioner and respondent, both white, were divorced on May 29, 1980, by order of the Circuit Court of the Thirteenth Judicial Circuit of Florida (Pet. 3). At that time, petitioner was awarded custody of their three year-old child, Melanie (*ibid.*). On September 20, 1981, respondent filed a petition to modify the divorce decree, seeking to have custody of the child awarded to himself (*ibid.*; Pet. App. 23). Petitioner was then living with a black man whom she married a short time later, on November 21, 1981 (*id.* at 24). Respondent's principal argument in support of his petition to modify the custody order was the fact that petitioner was living with a black man, thereby allegedly creating a bad environment for the child (*ibid.*). Respondent also alleged that Melanie

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[1] Relying on *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), petitioner also argues (Pet. 14-15) that the state court's decision in this case violates substantive due process. Because we believe the equal protection issue is dispositive, we do not address the due process issue. See *Caban* v. *Mohammed*, 441 U.S. 380, 394 n.16 (1979).

had had head lice on two occasions and that he had found her wearing mildew-stained clothing (*ibid.*).

On February 1, 1982, the Circuit Court held a hearing on respondent's petition for a change in custody. The evidence at the hearing consisted of the testimony of both parties and an investigative report prepared for the court by a Circuit Court Counselor (Pet. App. 23). On March 1, 1982, the Circuit Court issued an order awarding custody to respondent (*id.* at 23-28). The court made no findings with respect to what it termed respondent's "secondary" allegations concerning the head lice and the mildew-stained clothing (*id.* at 24). The court did find that petitioner had cohabited with her present husband before marriage and that one other male had been at her house on one occasion (*id.* at 24-25). The court also noted, however, and apparently accepted, petitioner's testimony that no sexual activity ever took place in the child's presence (*ibid.*). In addition, the court found that "both parties have remarried, and there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent" (*id.* at 24).

The court relied on the report of the Circuit Court Counselor who, the court noted, had "made a[n] [earlier] report in a case coming out of this Circuit also involving the social consequences of an interracial marriage. *Niles v. Niles*, 299 So. 2d 162" (Pet. App. 25). The counselor's recommendation was the same in both cases—custody of the child should be taken away from the mother because the mother " 'had chosen for herself and therefore for herself and her children, a life style unacceptable to the father of the children, a life style unacceptable to the father

of the children and the society in which we live' " (*id.* at 26 (citation omitted)).[2]

The court agreed with the counselor's recommendation and ordered the change in custody (Pet. App. 26-27):

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

Petitioner appealed to the Florida District Court of Appeal, Second District, which affirmed without opinion (Pet. App. 29). Because the Court of Appeal did not issue an opinion, the Supreme Court of Florida was without jurisdiction to review the case. See Fla. Const. Art V, § 3(b); cf. *Golden Leaf Bakery, Inc.* v. *Charles W. Rex Construction Co.*, 334 So. 2d 585 (Fla. 1976).

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[2] Although the Circuit Court Counselor's report mentioned other factors bearing on the custody issue, the court relied only upon the counselor's comment about petitioner's choice of life style.

SUMMARY OF ARGUMENT

A. The state court's decision in this case explicitly classifies on the basis of race by treating the custody determination differently than would have been the case had petitioner married a white man. Such explicit racial classifications are "presumptively invalid" (*Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979)), and they may be sustained only upon an "extraordinary justification" (*ibid.*) demonstrating the existence of a compelling governmental interest.

This stringent standard of review is not altered by the possibility that the state courts might apply the racial classification at issue to whites as well as blacks. "Equal application" of discriminatory classifications was rejected by this Court in *Loving* v. *Virginia*, 388 U.S. 1, 8 (1967), and it cannot save the racial classification at issue in this case.

B. The state interest asserted in support of the racial classification employed in this case is in preventing the social stigmatization that the court believed was "sure to come" (Pet. App. 27) if petitioner's child were raised in an interracial home. Notwithstanding the strong interest of a state in safeguarding the best interests of children whose homes must be designated by the state, prior decisions of this Court firmly establish that states may not accommodate their decisions to the continued existence of racial prejudice in our society, whether to prevent racial unrest generally or to protect the potential victims of such prejudice in particular. See, *e.g.*, *Lee* v. *Washington*, 390 U.S. 333 (1968); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Florida law provides that in all custody matters its courts are to be guided by the "best interests of the child." Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). In recognition of the fact that it is no business of government to accommodate actual or perceived popular prejudice, other states employing the same standard have held that the racial considerations that formed the basis for the decision below are irrelevant to the "best interests" determination. See cases cited at pages 11-12, *infra*. This is so not only because no valid evidence exists to support the proposition that living in an interracial home is inherently harmful to a child, but also because consideration of race in custody proceedings would as effectively penalize a parent's right to marry freely regardless of race (*Loving* v. *Virginia*, *supra*) as if the state continued to maintain an outright ban on interracial marriages. Moreover, the strength of petitioner's interest in retaining custody of her child (cf. *Santosky* v. *Kramer*, 455 U.S. 745 (1982)) makes the employment of racial classifications all the more impermissible. In short, race must be altogether stricken from consideration in custody determinations.

C. There is no merit to respondent's contention (Br. in Opp. 3-7) that the decision below rests on adequate and independent state grounds. Although the Circuit Court noted that petitioner had cohabited with her present husband prior to marriage, that finding is insufficient under state law to support the order changing custody. Under Florida law, a custodial parent's sexual conduct is relevant to a change-of-custody proceeding only to the extent that it has had a demonstrable adverse effect on the child. No such finding was made in this case; on the contrary, it is clear from the Circuit Court's opinion that no change in custody would have been ordered absent the

fact of petitioner's remarriage to a black man. Accordingly, petitioner's Equal Protection challenge is squarely before this Court.

ARGUMENT

THE FLORIDA COURT VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS BY REMOVING HER CHILD FROM HER CUSTODY ON ACCOUNT OF HER INTERRACIAL MARRIAGE

A. Consideration Of A Custodial Parent's Subsequent Interracial Marriage As A Ground For Modifying A Custody Order Constitutes A Presumptively Invalid Racial Classification That Can Be Justified Only If Precisely Tailored To Serve A Compelling State Interest

The power to regulate marriage, divorce, custody, and child welfare resides in the states, but that power is subject to the commands of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1, 7 (1967). The state court's decision in this case[3] explicitly classifies according to race by deciding the custody issue on the basis of petitioner's remarriage to a black man.[4] See *Loving* v. *Virginia*, 388 U.S. at 11; see also *McLaughlin* v. *Florida*, 379 U.S. 184, 188 (1964). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320

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[3] It is well established that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948).

[4] It is clear from the record that race was the primary (and probably the exclusive) basis for the state court's decision. See pages 17-18 & notes 10-11, *infra*.

U.S. 81, 100 (1943). These distinctions are odious because they are premised on the arbitrary and irrelevant basis of skin color—a basis for state action that the Fourteenth Amendment was specifically intended to eliminate. See *Loving* v. *Virginia*, 388 U.S. at 10; *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873). Accordingly, when such racial classifications are at issue, the state must "demonstrate that its classification [is] precisely tailored to serve a compelling governmental interest." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979).

This stringent standard of review is not in any way relaxed, as respondent contends (Br. in Opp. 11), by the possibility that the state courts might also consider the effects on a black child of being raised in an interracial household.[5] That a particular racial classification does not operate uniquely to the detriment of one race, but rather spreads disadvantage indiscriminately among all races, is without constitutional significance. *Loving* v. *Virginia*, 388 U.S. at 9 ("the fact of equal application does not im-

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[5] Commentators have observed, however, that consideration of race in custody proceedings typically occurs in the situation presented here, in which the white mother of a white child subsequently marries a black man. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 Buffalo L. Rev. 303, 304 (1968); Note, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. Ill. L.F. 256, 257, 263. The observation is borne out by the cases cited at pages 11-12, *infra*.

munize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); *McLaughlin* v. *Florida*, 379 U.S. at 188-192. The Equal Protection Clause does not "protect" certain racial classes to the exclusion of others; it protects all persons from invidious racial classification. As the Court stressed in *Shelley* v. *Kraemer*, 334 U.S. at 22, the Equal Protection Clause creates "personal rights," "guaranteed to the individual." It is thus no answer to say that the rights of individuals of both races may be infringed. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities" (*ibid.*).

The Circuit Court treated petitioner's sexual relationship with a black man and her subsequent marriage to him differently than it would have had the man been white. Petitioner's right to marry freely regardless of race was thus burdened in a way that the same right of other custodial parents is not. This differential treatment of an interracial marriage constitutes a presumptively invalid racial classification.

B. The State Court's Racial Classification Is Not Precisely Tailored To Serve A Compelling State Interest

1. The state interest asserted in support of the racial classification established below is in preventing the social stigmatization that the court believed was "sure to come" (Pet. App. 27) if Melanie continued to live in an interracial home. It cannot be denied that the State of Florida has a valid interest in safeguarding the best interests of children whose homes are to be designated by the state's divorce courts. Nor can it be denied that racial prejudice still exists in our society and that children subjected to such prejudice may be adversely affected.

Nevertheless, this Court has made it clear in a variety of contexts that bowing to popular prejudice, whether to protect the potential victims of such prejudice or to avoid racial unrest generally, cannot constitute a sufficient justification for departing from the constitutional command of equal protection. In *Buchanan* v. *Warley*, 245 U.S. 60 (1917), the Court unanimously invalidated an ordinance barring blacks from acquiring residences in predominantly white neighborhoods and barring whites from acquiring residences in predominantly black neighborhoods. The Court stated (*id.* at 81) that:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

See also *Watson* v. *City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting claim that gradual "facility-by-facility" desegregation of municipal parks was "necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"); *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) ("[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights."). Even in the prison context, in which racial unrest is often intense and the threat of violence ever present, the Court has indicated that the Fourteenth Amendment does not permit prison officials to make blanket celling classifications according to race to accommodate the prejudices of inmates or to prevent racial conflict assumed to be inevitable. See *Lee* v. *Washington*, 390 U.S. 333 (1968); see also *id.* at 334 (Black, J., concurring).

The governing principle of these cases was cogently stated by Justice White: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting). In short, the existence of racial prejudice in our society cannot serve as a permissible basis for employing racial classifications.

2. Florida law provides that in all custody matters the courts are to be guided by the "best interests of the child." Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). In other states employing the same standard, the racial considerations that formed the basis for the decision below have been held irrelevant to the "best interest" determination. See *In re Marriage of Kramer*, 297 N.W.2d 359, 361 (Iowa 1980) ("[c]ommunity prejudice, even when shown to exist, cannot be permitted to control the makeup of families"); *Potter* v. *Potter*, 372 Mich. 637, 648, 127 N.W.2d 320, 326 (1964) (citation omitted) (possible future effects on child of mother's interracial marriage " 'are matters wholly of speculation and conjecture, and as such may not affect the present [custody] determination' "); *Edel* v. *Edel*, 97 Mich. App. 266, 293 N.W.2d 792 (1980) (white mother's relationship with and plans to marry a black man irrelevant to custody determination); *In re Brenda H.*, 305 N.E.2d 815, 819 (Ohio C.P. 1973) (white mother's marriage to a black man is of "no significance" in custody determination); *Commonwealth ex rel. Myers* v. *Myers*, 468 Pa. 134, 144, 360 A.2d 587, 591 (1976) (father's concern that his children might have

"racial problems" due to mother's relationship with a black man "is not relevant" in custody determination); *Commonwealth ex rel. Lucas* v. *Kreischer*, 450 Pa. 352, 299 A.2d 243 (1973) (interracial marriage cannot be sole reason for denying custody).

These decisions correctly recognize, contrary to the state court's decision in this case, that the custodial parent's subsequent interracial marriage is simply an impermissible consideration in a change-of-custody proceeding. As one court has noted (*In re Brenda H.*, 305 N.E.2d at 819 (emphasis added)):

> Irrespective of the chances for success or failure of bi-racial or other "mixed" marriages and in spite of abounding prejudice of all kinds (racial, ethnical [sic] and religious) the American "melting pot" will continue to bring about the marital union of persons of different racial, religious and cultural backgrounds. *The law wisely does not and should not interfere with this process.*

It is of course settled that a state may not criminally prosecute those who choose as their spouse a person of a different race. *Loving* v. *Virginia*, *supra*. It necessarily follows that a state may not penalize the right to marry freely regardless of race by taking away the children of persons who exercise that right. Indeed, in light of the strength of petitioner's interest in keeping her child (cf. *Santosky* v. *Kramer*, 455 U.S. 745 (1982)), permitting race to be considered in change-of-custody proceedings burdens petitioner's right to marry as effectively as if the state had attempted to prohibit the marriage altogether.

In addition to Florida, one other state allows consideration of a subsequent interracial marriage so long as race is not treated as the "controlling" factor

in custody determinations.[6] *Russell* v. *Russell*, 80 Ill. App. 3d 41, 43, 399 N.E.2d 212, 215 (1979) (permissible for trial court to acknowledge potential social pressures attributable to interracial marriage so long as race alone is not the decisive factor); *Langin* v. *Langin*, 2 Ill. App. 3d 544, 547, 276 N.E. 2d 822, 824 (1971) (quoting *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 486, 133 N.E.2d 532, 535 (1976)) (" 'race alone can[not] outweigh all other considerations and be decisive of the question [of custody]' ").[7]

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[6] In the instant case, it appears that racial considerations were given controlling weight (see pages 17-18 & notes 10-11, *infra*). But the Circuit Court relied (Pet. App. 25) on a prior Florida case holding that the "effect of an interracial marriage upon a particular child is but one of many factors which may be considered in determining the person in whose custody the child's best interest would be served." *Niles* v. *Niles*, 299 So. 2d 162, 162-163 (Fla. Dist. Ct. App. 1974). In light of this language, and because there were other factors present in *Niles* that arguably supported a change in custody, one commentator has suggested that *Niles*, if strictly construed, authorizes consideration of racial factors only to the extent that demonstrable harm to a particular child can be shown. Comment, *Child Custody—Interracial Marriage May be Considered in Framing Custody Modification Orders*, 3 Fla. St. U.L. Rev. 290, 293 n.6, 300 (1975). So construed, *Niles* does not support the decision below. See page 15 note 9, *infra*.

[7] Similar results have been reached by courts considering custody disputes following the divorce of an interracial couple. *See Beazley* v. *Davis*, 92 Nev. 81, 545 P.2d 206 (1976) (unconstitutional to deny a white mother custody of her children solely because they share the physical characteristics of their black father); *Fountaine* v. *Fountaine*, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956) (race alone cannot outweigh all other factors in the custody determination); *Tucker* v. *Tucker*, 14 Wash. App. 454, 542 P.2d 789 (1975) (declines to follow an earlier decision of the Supreme Court of Washington, *Ward* v. *Ward*, 36 Wash. 2d 143, 216 P.2d 755 (1950), and rules that race is relevant but not controlling).

It is our view that these decisions are erroneous. Once race is held to be a "relevant" consideration, it is virtually impossible to prevent it from becoming the "controlling" consideration in any particular case. If, for example, the natural parents are each found equally fit, then consideration of one parent's subsequent interracial marriage necessarily will be converted into the decisive factor. Moreover, even if it could be confined to "relevant" rather than controlling status, considering race at all in the custody decision would be unconstitutional. As one court has recognized, "[t]he very act of considering race as a factor, and then disregarding it as a controlling factor, requires that the state admit contrary to the Constitution, that there are differences in human beings because of their color." *DeLander* v. *DeLander*, 37 U.S.L.W. 2139, 2139 (Cal. Super. Ct. Aug. 14, 1968).[8] We therefore submit that race should be

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[8] In adoption proceedings, which also are governed by the "best interests of the child" standard, many courts have concluded that race may be considered but cannot be controlling. See *Drummond* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (en banc), cert. denied, 437 U.S. 910 (1978); *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955); *Compos* v. *McKeithen*, 341 F. Supp. 264 (E.D. La. 1972) (three-judge court); *In re R.M.G. & E.M.G.*, 454 A.2d 776 (D.C. 1982); *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E.2d 51 (1962); *Rockefeller* v. *Nickerson*, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962); see also *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967).

In the adoption area, therefore, courts appear to be more willing to allow serious consideration of racial factors than in child custody disputes between natural parents. Whether or not these decisions are correct (a question not now before the Court), various rationales have been advanced to justify a distinction between adoption proceedings and custody pro-

altogether stricken from consideration in change-of-custody proceedings.[9]

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ceedings. In the adoption context, the prospective parents ordinarily have no legal claim to the child. Cf. *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 838-847 (1977). In addition, the nature of the state's interest in regulating adoptions is different. Traditionally, the object has been to find a couple that could have biologically parented the child in order to provide, as nearly as possible, the family environment he or she might otherwise have had. There has thus been an effort to "match" the physical characteristics, including race, of children and their prospective parents. See *Drummond*, 563 F.2d at 1205-1206. The wisdom of race matching has been the subject of some controversy (see Grossman, *supra* note 5, at 318-319), but most commentators agree that race should be considered. Note, *supra* note 5, at 261; *Grossman*, *supra* note 5, at 346. But these factors have no bearing in custody disputes between a child's natural parents, each of whom has an equal claim to the child.

[9] Even if we were to assume, arguendo, that the existence of racial prejudice could ever serve as a permissible basis for employing racial classifications, such a justification is clearly inadequate in this case because there has been no finding that Melanie would in fact be adversely affected by community reaction to petitioner's interracial marriage. The only "evidence" of detriment to Melanie was respondent's testimony to his own feelings that the mixed marriage would put a strain on the child and the Circuit Court Counselor's conclusion that petitioner's choice of a life style unacceptable to respondent and to society was a ground for changing custody. The court rejected respondent's "resentment" of petitioner's choice of a black partner as a basis for changing custody, but rested its decision on the speculation that social stigmatization was sure to come. The court heard no expert testimony on this subject, and the commentators have found no authoritative evidence that an interracial home life is inherently harmful to a child. See Note, *supra* note 5, at 263; *Comment*, *supra* note 6, at 296-299; Note, *Custody Disputes Following the Dissolution of Interracial Marriages: Best Interests of the Child or Judicial Racism?*, 19 J. Fam. L. 97, 102 (1980).

C. No Independent And Adequate State Ground Supports The Judgment Below

There is no merit to respondent's contention (Br. in Opp. 3-7) that the decision below rests on independent and adequate state grounds. Respondent relies primarily (*id.* at 5) on the Circuit Court's finding that petitioner had cohabited with her present husband prior to marriage (Pet. App. 24-25, 26), but that finding is insufficient under state law to support the order changing custody.

Florida law grants the trial court broad discretion in making initial custody determinations. *Culpepper* v. *Culpepper*, 408 So. 2d 782, 784 (Fla. Dist. Ct. App. 1982). Mothers and fathers are to be given equal consideration in such determinations. Fla. Stat. Ann. § 61.13(2)(b)(1) (West Cum. Supp. 1983). Once a custody determination has been made, however, a party seeking a change in custody carries an "extraordinary burden" (*McGregor* v. *McGregor*, 418 So. 2d 1073, 1074 (Fla. Dist. Ct. App. 1982)), and the court has less discretion to modify a decree than it does when making the initial custody determination. *Culpepper*, 408 So. 2d at 784. A change in custody may be ordered only upon "competent, substantial evidence" showing (1) that there has been a "substantial or material change" in the parties' circumstances *and* (2) that the best welfare of the child will be promoted by a change in custody. *Stricklin* v. *Stricklin*, 383 So. 2d 1183, 1184 (Fla. Dist. Ct. App. 1980).

Petitioner's relationship with a man and her subsequent marriage to him undoubtedly constitute a "substantial or material change" within the meaning of the first prong of the test. But the extramarital sexual conduct of a custodial parent is not automatic

grounds for a change in custody. Such conduct may support an order changing custody only if there is evidence that it adversely affects the welfare of the child. *Lisenby* v. *Lisenby*, 419 So. 2d 354, 355 (Fla. Dist. Ct. App. 1982); *Culpepper*, 408 So. 2d at 784-785. In *Lisenby*, the court reversed an order removing a child from a mother who, like petitioner here, had engaged in sexual activity with men, including her subsequent husband, but never in her child's presence.

The Circuit Court opined (Pet. App. 26) that petitioner's sexual conduct "tended to place gratification of her own desires ahead of her concern for the child's future welfare," but the court did not conclude that Melanie was, in fact, adversely affected by petitioner's sexual conduct. Thus, under Florida law, petitioner's sexual conduct cannot support the order removing the child from her custody. Indeed, but for the court's concern for the anticipated effects of petitioner's interracial marriage on the child, nothing in the opinion suggests that a change in custody would otherwise have been ordered.[10] The court found "no issue" as to petitioner's "devotion to the child, adequacy of housing facilities, or respectability" of her new spouse (*id.* at 24). The judgment therefore necessarily rests primarily, if not exclusively, on the court's concern for what it perceived to be the inevitable "social stigmatization" to be suffered by

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[10] Respondent also argues (Br. in Opp. 5) that the Circuit Court "referenced" testimony to the effect that Melanie had had head lice on two occasions and that she spent eight hours each day in a day-care center. But the Circuit Court made no findings with respect to the head lice, nor did it give any indication that that matter or the day care issue played any part in the ultimate decision.

Melanie because her mother had married a black man.[11]

Even if the Circuit Court's statement about petitioner's conduct tending to place her own interests ahead of her child was meant to be a finding of adverse effect on the child, this Court would still have jurisdiction. The Circuit Court explicitly rested its judgment on the perceived effects of the interracial marriage as well, and it never indicated that petitioner's sexual conduct standing alone was of such import as to warrant the change in custody. The Equal Protection Clause is violated whenever racial purpose is among the motivating factors for an official decision if other grounds standing alone are not adequate to support it. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266, 270-271 n.21 (1977); *Mt. Healthy City*

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[11] We have shown that petitioner's pre-marital sexual conduct, irrespective of the race of her partner, is insufficient, under Florida law, to support the judgment below. We note, however, that even on this issue the Circuit Court seems to have taken note of petitioner's pre-marital sexual relations with her present husband only because of his race. The court's statement (Pet. App. 26) about petitioner's having placed her own gratification ahead of her concern for her child's future welfare appears in the middle of a paragraph otherwise devoted solely to the issue of race. Moreover, the court's concern with petitioner's pre-marital sexual conduct related to the *future* welfare of the child rather than to any concern for her present welfare (*ibid.*). Because the court apparently did not believe that Melanie would suffer from the "social stigmatization" of living in an interracial home until she reached school age (*id.* at 27), the most natural reading of the court's comment about petitioner's pre-marital sexual relations is that it too was based on the race of petitioner's partner.

School District Board of Education v. *Doyle*, 429 U.S. 274, 285-287 (1977).

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

Respectfully submitted.

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